Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

LINDA SMITH and GREGORY SMITH,

Petitioners,

v.

GENERAL MOTORS CORPORATION GENERAL MOTORS GLOBAL HEADQUARTERS and POWERTRAIN DIVISION MORAINE ENGINE PLANT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an appellate court violates the constitutionally guaranteed right to a trial by jury when it affirms a summary judgment decision in favor of the nonmoving party where genuine issues of material fact remain unresolved?

Whether an appellate court having subject matter jurisdiction over a controversy through diversity pursuant to 28 U.S.C. § 1332, violates the sovereignty guaranteed to the states by the Tenth Amendment when it misapplies state substantive law?

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OPINIONS BELOW

The ruling of the United States Court of Appeals for the Sixth Circuit dated March 8, 2006, affirming the decision of the District Court is not officially reported but is unofficially reported as *Smith v. GMC*, No. 05-3498, 2006 U.S. App. LEXIS 5983 (6th Cir. 2006) and a copy is reproduced at Appendix A, pages 1a-21a.

The decision and entry of the United States District Court for the Southern District of Ohio, Western Division, dated March 24, 2005, overruling Petitioners' renewed motion for reconsideration was neither officially nor unofficially reported; however, a copy of this decision and entry is reproduced at Appendix B, pages 22a-36a.

The decision and entry of the United States District Court for the Southern District of Ohio, Western Division, dated March 22, 2004 sustaining Respondents' Motion for Summary Judgment and entering judgment in favor of Respondents and against the Petitioners was neither officially nor unofficially reported; however, a copy of this decision and entry is reproduced at Appendix C, pages 37a-62a.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on March 8, 2006. This Court has jurisdiction to review the order of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. VII:

> Trial by jury in civil cases.
>
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. X:

> Powers reserved to states or people.
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

A. Course of Proceedings

This action was originally brought on December 12, 2001, by Linda and Gregory Smith (hereinafter collectively referred to as the "Smiths") against General Motors Corporation and the General Motors Powertrain Division Engine Plant in Moraine, Ohio (hereinafter collectively referred to as the "Respondents") in the Montgomery County, Ohio Court of Common Pleas. The basis of the Smiths' complaint was that Respondents had committed an employer

intentional tort against Linda Smith ("Linda"). In January of 2002, the case was removed to the United States District Court for the Southern District of Ohio, Western Division, pursuant to 28 U.S.C. § 1332 on the grounds of diversity of citizenship.

On May 28, 2003, Respondents filed a Motion for Summary Judgment, arguing that the Smiths could not present sufficient evidence to prove the elements of an employer intentional tort under Ohio law. On July 30, 2003, the Smiths received an oral communication from Judge Rice's staff indicating that the District Court was planning on entering summary judgment in favor of Respondents. Pursuant to this information, the Smiths filed a Motion for Reconsideration on September 25, 2003. Nevertheless, on March 22, 2004, the District Court issued a written decision and entry sustaining Respondents' Motion for Summary Judgment and overruling the Smiths' Motion for Reconsideration. The District Court's written decision and order stated that summary judgment was appropriate because the Smith's had failed to present any evidence that Respondents had knowledge that Linda's injury was substantially certain to occur. On April 1, 2004, the Smiths filed a renewed Motion for Reconsideration, but the District Court also overruled this motion on March 24, 2005.

The Smiths timely appealed the District Court's decision to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the District Court's decision on March 8, 2006, and the Smiths initiated an appeal of this decision via the filing of this timely petition for a writ of certiorari.

B. Relevant Facts

Linda began working at the General Motors Powertrain Division Engine Plant in Moraine, Ohio (the "Moraine Plant") in 1993 and became a job setter at the plant in February of 1999. Approximately two months prior to February of 2000, Linda was transferred to a new machine known as Operation 40, which was an automated engine head assembly line. According to Linda's immediate supervisor, Joseph Dalbey ("Dalbey"), Operation 40 consisted of 14 workstations, some of which contained multi-spindle drilling machines that would drill holes in the engine heads. Working in conjunction with the drilling machines was a transfer bar that would place the engine head in a position to be acted upon by the drilling machines. The ultimate purpose of this equipment was to create holes in various places on engine heads. A six foot high metal barrier guard surrounded the equipment; however, a swing gate located at each workstation could be opened, allowing easy access to the moving parts of Operation 40.

If it became necessary to repair Operation 40, a lockout/tagout procedure could be initiated whereby power to the machine was shut off so that employees could work on the machine without being injured. However, on occasion a jam-up would occur and the transfer bars would not cycle through because something was physically preventing them from doing so. The lockout/tagout procedure could not be utilized when performing troubleshooting on a jammed-up machine because without power to the transfer bars, the fingers that held the engine head would drift down and no longer be in contact with the engine head. Under these circumstances, it was impossible to see where the jam-up existed. In other words, the machine had to be running in order to detect the source of a jam-up.

Moreover, employees troubleshooting a jam-up would have to place themselves close to the transfer bar in order to determine what was causing the jam-up. The reason for this was because "when you are troubleshooting, you may not know which of these events are occurring causing the machine or the transfer bars not to go all the way forward or go all the way back."

In order to perform the visual inspection necessary to conduct troubleshooting in the case of a jam-up, employees had to go through the swing gate and behind the guard surrounding the drilling machine. According to the deposition testimony of Mr. Peter Buczek, the Senior Manager of Health and Safety for the GM Powertrain Division, there were no protections for employees inside the barrier surrounding the machine.

Despite the fact that the lockout/tagout procedure could not be utilized when trouble shooting for jam-ups, and the fact that there were no protections for employees inside of the barrier guards, it was expected that employees working on Operation 40 would go behind the guard surrounding the stations to troubleshoot jam-ups. Indeed, Mr. Dalbey testified that not only was it "pretty common before February 9, 2000 for employees to be inside of the swing guard on Operation 40 with the spindles running," but that when he was hired, his supervisor had instructed him to troubleshoot jam-ups in precisely this manner. In fact, Homer Parsons, an employee of Respondents for approximately twenty years, confirmed that troubleshooting of jam-ups was performed in this way, and that Respondents' supervisors had endorsed this unsafe practice as the standard to be followed whenever jam-ups occurred. Mr. Buczek, acknowledged that such a practice constituted an obvious and inherent risk to the employees.

Part of Linda's job description involved troubleshooting machines on Operation 40. An example of troubleshooting would be a situation when a transfer bar would not cycle properly because of a jam-up. On February 9, 2000, one of the machines on Operation 40 began malfunctioning. Accordingly, Linda contacted a skilled tradesman for assistance, and the two repaired a broken brushing. However, something was still wrong with Operation 40 and there appeared to be some sort of jam-up. In response to the apparent jam-up, Linda, following her training and the normal operating procedure of the Moraine Plant, went behind the guard surrounding station 13 to locate the source of the jam-up without shutting off power to the machine using the lockout/tagout procedure. In addition to the fact that Linda was forced to enter the gate guard to observe the functioning of the machinery while it was still operating in order to effectively troubleshoot, the lack of adequate ambient lighting in the area resulted in her having to use a flashlight and move within two feet of the machinery's revolving spindles to see what was happening inside. Not seeing any problem with that station, Linda turned to walk away. Unfortunately, her sleeve became entangled in a moving spindle drill and, before she could untangle herself, her ponytail also became entangled with a moving spindle drill. As a result, Linda suffered severe injuries, including the removal of her scalp from her head.

Following the accident, Respondents were cited by the Occupational Safety and Health Administration (OSHA) for failing to interlock the swing gate guards. An interlock is an electronic disconnect which would have cut off the power to Operation 40 each time the gate guard was opened, similar to the manner in which a microwave oven shuts off every time its door is opened. Additionally, the testimony of

Respondents' employees established that the work practices at the Moraine Plant endorsed by plant supervisors contravened Respondents' own written safety rules and required Linda to engage in troubleshooting jam-ups in a horribly unsafe manner, thereby exposing her to a condition in which a trier of fact may determine that an injury was substantially certain to occur. In addition, the Moraine Plant safety supervisor, Amy Beyer, confirmed in a report following Linda's accident that Linda's actions, which were approved by management, violated Respondents' internal safety rules and contributed to Linda's accident.

REASONS FOR GRANTING THE PETITION

In affirming the decision granting summary judgment in favor of Respondents, the Sixth Circuit failed to properly apply the jurisprudence regarding summary judgment and Ohio's employer intentional tort law. This failure deprived the Smiths of their constitutional right to have a jury determine the facts of their case and violated the Tenth Amendment's guarantee of state sovereignty.

A. Right to Trial by Jury

Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, *show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*" (Emphasis added.) Summary judgment is improper where material issues of fact remain unresolved. *See South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 111-112 (2004). Moreover, where the court fails to construe the evidence

before it in favor of the nonmoving party, the nonmoving party's right to have a jury determine the facts is unjustifiably infringed upon. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-258 (1986); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-154 (2000); *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350, 353-354 (1943).[1] As this Court has stated:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson, 477 U.S. at 255. The Smiths' right to have a jury determine the facts of the case is protected by the Seventh Amendment because, as will be shown below, the present action sounds in tort and seeks legal remedies. *See Curtis v. Loether*, 415 U.S. 189, 192-198 (1974); *Teamsters v. Terry*, 494 U.S. 558, 570 (1990).

When exercising jurisdiction pursuant to 28 U.S.C. § 1332, as is the case here, federal courts must apply the substantive law of the forum state. *Erie R.R. v. Tompkins*,

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1. It must be noted that all three of these cases deal with a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 rather than a motion for summary judgment made under Fed. R. Civ. P. 56; however, "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves*, 530 U.S. at 150, quoting *Anderson*, 477 U.S. at 250-251.

304 U.S. 64, 78 (1938). Ohio law affords employees injured during the course of employment compensation through the Ohio's Workers' Compensation Act. Ohio Const. II § 35; Ohio Rev. Code § 4123 *et seq.* Under normal circumstances, an employee is limited to recovery under the Workers' Compensation Act; however, the Ohio Supreme Court has recognized an exception to this rule where the employee's injury has been caused by the employer's intentional tort. *Blakenship v. Cincinnati Milacron Chemicals, Inc.*, 433 N.E.2d 572, 576 (Ohio 1982). In *Fyffe v. Jeno's, Inc.*, 570 N.E.2d 1108 (Ohio 1991) the Ohio Supreme Court established a three prong test to determine whether an employer has committed an intentional tort. That test is as follows:

> in order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

Id. at 1112.

Herein, neither the Respondents nor the lower courts challenged the fact that Operation 40 constituted a dangerous process, procedure, instrumentality, and condition within Respondents' business operations. Likewise, there has been no challenge regarding the fact that Respondents knew of the dangerous condition. Therefore, it is undisputed that the first prong of the *Fyffe* test has been satisfied. Additionally, the record clearly shows that Linda was required to go behind the barrier guard while the drilling machines were still running in order to troubleshoot the jam-up. In fact, the Sixth Circuit's opinion cites to Respondents' Appellee brief and states that "entry through the barrier was the only way a problem involving the transfer bar could be diagnosed." Thus, the evidence demonstrates that Respondents required Linda to perform the dangerous task and the third prong of *Fyffe* is also satisfied. Nonetheless, Defendant argues, and both the District and Circuit courts agreed, that the Smiths have failed to present any evidence proving that Respondents knew that there was a substantial certainty that Linda would be injured upon being subjected to this dangerous task. We submit that there is at least a material issue of fact regarding Respondents' knowledge and that both the District and Circuit court violated the Smiths' right to have a jury determine the facts when they construed the facts in favor of Respondents.

The Ohio Supreme Court has specifically rejected the requirement that an employer have actual subjective intent to injure an employee. *Fyffe*, 570 N.E.2d at 1111. Instead the court adopted the following standard:

> To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of

> some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk — something short of substantial certainty — is not intent.

Id. at 1112.

In determining whether an employer was substantially certain that an injury would occur, Ohio courts have considered the following evidence: (1) whether the employees were required to perform work in a manner that involved the circumvention or removal of a safety guard, *Fyffe*, 570 N.E.2d at 1113; (2) whether there were violations of OSHA and other safety regulations, *Medina v. Harold J. Becker Co.*, 840 N.E.2d 1112, 1119-1120 (Ohio Ct. App. 2005); and (3) whether there were prior similar incidents, *Taulbee v. Audience Inc., BMI Div.*, 696 N.E.2d 625, 631-632 (Ohio Ct. App. 1997). The Smiths have presented evidence related to each of these.

Evidence that an employer required an employee to remove or circumvent a safety guard is sufficient proof to overcome summary judgment on the issue of whether the employer was substantially certain that an employee would be injured. *Fyffe*, 570 N.E.2d at 1113. Ohio Administrative Code § 4123:1-5-01(B)(69) defines a safety guard as,

"the covering, fencing, railing, or enclosure, which shields an object from accidental contact." In support of their contention that the metal fencing surrounding Operation 40 met the definition of a safety guard, the Smiths introduced the accident report of Moraine Engine Plant safety supervisor, Amy Beyer, which stated that the barrier Smith removed was a guard and that the purpose of the guard was to protect employees from the revolving spindles of the spindle machines. The Smiths also presented the testimony of Linda's supervisor, Mr. Dalbey, who referred to the gate portion of the Operations 40 barrier as a "swing guard".

Obviously, if the evidence in the record is viewed in a light most favorable to the Smiths, as it should have been, the six foot metal barrier surrounding Operation 40 could fall within the statutory definition of a safety guard. However, not only did the Sixth Circuit fail to construe the evidence in a light most favorable to Linda, but it actually did the opposite and cited the description of the metal fencing given by Respondents' safety supervisor, Peter Buczek, who called the fence an "awareness barrier" and stated that its purpose was to "prevent somebody from going into the hazard area inadvertently. And to access the area to do troubleshooting they would have to open the device making them aware that they were entering the area that could be hazardous if it was operating." While it may have been proper for a jury at trial to believe Mr. Buczek's explanation of the metal fencing, it certainly was not proper for the Sixth District to do so in a summary judgment proceeding. If the Appellate Court had not engaged in improperly weighing the evidence, summary judgment would have been denied and a jury could have decided the question. Instead, the Sixth District took it upon itself to determine crucial facts necessary for determining Respondents' liability.

The Sixth Circuit also failed to construe the evidence in favor of the Smiths when it held that even if the metal fencing is a guard there was no evidence that Respondents instructed Linda to circumvent the guard. This statement is clearly at odds with the testimony of Mr. Dalbey, Linda's supervisor, and Mr. Parsons, Linda's co-worker, who testified that not only was it common practice at the Moraine Engine Plant to enter the metal fencing area while the drilling machines were running to troubleshoot jam-ups, but that it was a necessary and officially endorsed practice that the supervisors at the plant taught to employees. The only manner in which the Sixth Circuit could have reached its conclusion that the gate was not a guard was to totally discount all of the testimony supporting the Smiths' position.

Furthermore, evidence of OHSA and other safety violations related to an employee's accident can be considered as evidence that the employer was substantially certain an employee would be injured. *Medina*, 840 N.E.2d at 1119-1120. It is undisputed that Respondents were cited with OSHA violations as a result of Linda's accident. Moreover, Mr. Buczek, acknowledged that the practice of entering the metal gate area surrounding Operation 40 while the machines were still running constituted an obvious and inherent risk to employees and was generally against General Motors' safety policy. Respondents also violated their own internal safety regulations by allowing Linda to work around running machinery in loose overalls that were provided by Respondents and with her hair in a pony tail without a hairnet. Nonetheless, the Sixth Circuit failed to even address Respondents' OSHA violations and only peripherally addressed the fact that many of Respondents' own safety regulations were violated. Instead of viewing the evidence in favor of the Smiths, the Sixth Circuit proceeded to weigh

the evidence and make the conclusory statement that such evidence did not amount to the degree of proof necessary to show that Respondents were substantially certain that an injury would occur.

Finally, Ohio courts have also held that prior similar incidents are probative of whether an employer was substantially certain that an injury could occur. *Taulbee*, 696 N.E.2d at 631-632. Furthermore, near misses in which no serious injuries occurred are also probative of an employer's knowledge. *Moebius v. GMC*, Case No. 19147, 2002-Ohio-3918, at ¶ 35-39 (Ohio Ct. App. 2002). As evidence that prior similar incidents had occurred, the Smiths presented the testimony of Randy Pettit who had received extensive injuries prior to Linda's injuries while working on a multi-spindle drilling machine at the Moraine Engine Plant when he came in contact with the revolving spindles while wearing loose, plant-supplied coveralls after he had circumvented the safety guard and was inside the barrier attempting to repair a problem on the drilling machine. Furthermore, Mr. Watkins, an employee at the Moraine Engine Plant for thirty-two years, testified that he was personally aware of other GM employees whose sleeves had been caught and torn in revolving spindles, prior to Linda's incident. Despite this evidence of similar incidents and near misses, the Sixth Circuit adopted the position of the District Court wholesale and attempted to distinguish Pettit's injuries by finding that Pettit was injured when he was trying to reach into a machine rather than trying to view a jam-up as Linda was. Thus, the Sixth Circuit held that Respondents did not have knowledge of the exact injury that occurred to Linda. Once again, the Sixth Circuit failed to fully consider all of the evidence in favor of the Smiths' position and improperly engaged in determining the appropriate weight to be given the evidence. Rather than

allowing a jury could make the determination as to whether the circumstances surrounding Pettit's injuries constituted a similar incident, the Sixth Circuit rendered that factual determination as a matter of law.

The underlying problem pervading the Sixth Circuit's entire opinion is that it failed to construe the evidence in favor of the Smiths. By not doing so, the court denied the Smiths their right to have a jury determine the facts of their case. *Anderson*, 477 U.S. at 254-258; *Reeves*, 530 U.S. at 146-154; *Bailey*, 319 U.S. at 353-354. Ohio courts have long held that an employee can overcome a summary judgment motion on the issue of whether an employer's dangerous practice was substantially ceratin to cause an employee harm through evidence proving that the dangerous practice involved the removal of a guard. Further, Ohio courts have also held that evidence that the dangerous practice resulted in OSHA or other safety violations and evidence of a similar incident is relevant to the inquiry regarding an injury's substantial certainty. The Smiths presented evidence on each of these points in support of their contention that Linda's injury was substantially certain to occur, but the Sixth Circuit refused to give the Smiths' evidence the proper consideration. If the issues had gone to a jury and been decided in favor of Respondents and the Smiths were appealing the issues under a manifest weight argument, the Sixth Circuit would have been justified in weighing the evidence in favor of Respondents and finding that the jury's verdict was sustainable. However, none of these issues ever reached a jury. Instead, the Sixth Circuit substituted its own factual determinations and conclusions for those of the jury. Given the evidence presented by the Smiths and the nature of the proceedings, the Sixth Circuit should have at the very least ruled that there was sufficient evidence in the record to overcome summary judgment and allowed the case to go before a jury.

This Court has made similar rulings in *Reeves* and *Bailey*. In *Reeves*, plaintiff brought suit against his employer for age discrimination. *Reeves*, 530 U.S. at 137-138. At trial, the District Court rejected defendant's motions for judgment as a matter of law, and the jury returned a verdict for plaintiff.[2] *Id.* at 138-139. The Fifth Circuit reversed on appeal, finding that plaintiff had not introduced sufficient evidence that age was a motivating factor in plaintiff's dismissal. *Id.* at 139-140. On certiorari, this Court held that defendant was not entitled to judgment as a matter of law because, when drawing all reasonable inferences from the record in favor of the nonmoving party, plaintiff had introduced sufficient evidence to allow a jury to make the determination concerning whether defendant had engaged in age discrimination. *Id.* at 149-154. Specifically, this Court held that

> although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, *at least to the extent that evidence comes from disinterested witnesses.*'

Id. at 151, quoting Wright & Miller 299, 300 (emphasis added)

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2. As previously stated herein, "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves*, 530 U.S. at 150, quoting *Anderson*, 477 U.S. at 250-251.

In *Bailey*, an employee was injured during the course of his employment with the defendant. *Bailey*, 319 U.S. at 351. At trial, the court denied a motion for judgment as a matter of law, and the jury returned a verdict for the employee; however, the state supreme court reversed this decision and held that the employer was entitled to judgment as matter of law. *Id.* at 350. On certiorari, this Court reversed the state supreme court, finding that the employee had presented sufficient evidence on the issue of whether the employer had presented an unsafe workplace and that the jury was "the tribunal under our legal system to decide that type of issue as well as the issues involving controverted evidence." *Id.* at 352-353. This Court also acknowledged that the right to a jury trial is a basic and fundamental feature of our system of justice and held that "[t]o deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Id.* at 354.

Had the Sixth Circuit been applying the principles outlined in the above cases it would not have affirmed the District Court's decision granting Respondents summary judgment. The Smiths certainly produced enough evidence, especially if all reasonable inferences had been drawn in their favor, to allow a jury, the tribunal recognized under our legal system as the arbiter of facts, to determine whether Respondents violated Ohio's employer intentional tort law. It was especially improper for the Sixth Circuit to affirm summary judgment in light of this Court's admonishment that evidence considered in favor of a party moving for summary judgment should come from disinterested witnesses. Respondents presented no such disinterested evidence.

Based on all of the foregoing, it is abundantly clear that the Sixth Circuit erred when it affirmed the District Court's summary judgment decision and that this decision denied the Smiths their right to have a jury determine the facts of the case. Indeed, this case is very similar to another petition for writ of certiorari currently being considered by this Court. In *Roberson v. Game Stop/Babbage's*, Docket No. 05-883, the petitioner is seeking review of *Roberson v. Game Stop, Inc.*, No. 05-10308, 2005 WL 2622977, (5th Cir. Oct. 14, 2005), which affirmed the District Court's decision to grant the Respondents summary judgment. The petitioner in *Roberson* is seeking certiorari on the basis that the Fifth Circuit assumed the role of jury in the employment law context and impermissibly determined factual issues on summary judgment without viewing the available evidence in favor of the nonmoving party. This is precisely the issue involved in this case, albeit with a different circuit court and with the plaintiff alleging that the defendant employer committed a different tort. Nevertheless, both petitions seek the review of this Court to prevent Circuit Courts from imposing their factual determinations upon plaintiffs and usurping the near sacrosanct function of the jury.

B. Violation of State Sovereignty

The Tenth Amendment embodies the principle that State sovereignty remains as it was prior to the Constitution except where it is specifically abridged by the Constitution. *Cook v. Gralike*, 531 U.S. 510, 519 (2001). It also acknowledges the fact that the Constitution established a system of "dual sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997). "Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," *Id.* quoting

The Federalist No. 39, at 245 (J. Madison). The implication of the Tenth Amendment is that the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, resulted in residual state sovereignty. *Id.* This Court has explained the concept of "dual sovereignty" as follows:

> The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison).
>
> Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people — who were, in Hamilton's words, 'the only proper objects of government.'" Printz, supra, 521 U.S. at 919-920 (quoting The Federalist No. 15, at 109); accord, New York, supra, at 166 ("The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States"). In this the founders achieved a deliberate departure from the Articles of

> Confederation: Experience under the Articles had "exploded on all hands" the "practicality of making laws, with coercive sanctions, for the States as political bodies." 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911) (J. Madison); accord, The Federalist No. 20, at 138 (J. Madison & A. Hamilton); 3 Annals of America 249 (1976) (J. Iredell).
>
> The States thus retain "a residuary and inviolable sovereignty." The Federalist No. 39, at 245. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.

Alden v. Maine, 527 U.S. 706, 715 (1999).

The State of Ohio has exercised this sovereignty and established a detailed and thorough system for dealing with injuries to employees caused by the intentional torts of employers. As can be seen from the discussion above, while the Sixth Circuit recited the appropriate standards under the Ohio law, it failed to apply those standards according to the jurisprudence established in a long line of Ohio cases. The failure of the Sixth Circuit to correctly apply the Ohio law included: (1) its failure to find that the metal barrier surrounding Operation 40 is a safety guard under both Ohio case law and the Ohio Administrative Code; (2) its failure to find that Linda was required to circumvent the safety guard as part of her official job duties; (3) its failure to find that Linda's injury was substantially certain to occur; and (4) its failure to find that Respondents had instructed Linda and other employees to perform troubleshooting of jam-ups in precisely the manner Linda was performing the troubleshoot at the time of her injury.

Perhaps the most telling indictment of the Sixth Circuit's breach of Ohio's sovereignty is its heavy reliance on one of its own cases rather than the multitude of state law cases discussing these matters. In affirming the decision of the District Court, the Sixth Circuit repeatedly cited to and quoted *Jandro v. Ohio Edison Co.*, 167 F.3d 309 (6th Cir. 1999). The court even compared the facts of *Jandro* to the facts of this case and cited to *Jandro* for the proposition that "mere knowledge of a safety violation or a dangerous condition is not enough to support a finding of an employer intentional tort." The Sixth Circuit's reliance on its own prior cases rather than one of the many cases decided by Ohio's state courts, despite this Court's proclamation in *Erie*, 304 U.S. at 78 that "there is no federal general common law," only underscores how Ohio's sovereignty with respect to the doctrine of employer intentional tort was abrogated by the Sixth Circuit. In short, the Sixth Circuit has infringed upon Ohio's sovereignty by refusing to properly apply the relevant standards and case law pertinent to Ohio employer intentional tort law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 8, 2006

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-3498

LINDA SMITH;

Plaintiff-Appellant,

GREGORY SMITH,

Plaintiff,

v.

GENERAL MOTORS CORPORATION GENERAL MOTORS GLOBAL HEADQUARTERS and POWERTRAIN DIVISION MORAINE ENGINE PLANT;

Defendants-Appellees.

CHERYL McCURDY as PLANT MANAGER GENERAL MOTORS CORPORATION POWERTRAIN DIVISION MORAINE ENGINE PLANT,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Appendix A

MEMORANDUM OPINION

Before: MOORE and McKEAGUE, Circuit Judges; POLSTER, District Judge.*

McKEAGUE, Circuit Judge. Plaintiff-appellant Linda Smith appeals the district court's grant of summary judgment in favor of defendant-appellee, General Motors Corporation. Smith filed this action against General Motors to recover for injuries sustained during her employment at the Moraine Engine Plant in Moraine, Ohio. Smith asserts that she is entitled to recovery under the intentional tort exception to the Ohio Workers' Compensation Act. The district court granted defendant's motion for summary judgment, finding that Smith had not presented sufficient evidence to raise a genuine issue of material fact concerning whether General Motors knew with "substantial certainty" that the injury she sustained was likely to occur. For the following reasons, we affirm the district court's decision.

I. BACKGROUND

A. Facts

This case arises from injuries Linda Smith ("Smith") incurred on February 9, 2000, while working for General Motors Corporation Powertrain Division ("GM") at the Moraine Engine Plant located in Moraine, Ohio. The facts are not in dispute. Smith began her employment with GM in 1993, initially working on an assembly line. After six years,

* The Honorable Dan Aaron Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

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Smith began working as a job-setter. She performed this job for one and one-half years prior to her injury. For the two months preceding her accident, Smith worked on Operation 40, an automated assembly line composed of 14 stations of machines. Some of these machines were multi-spindle drilling machines, designed to drill holes in the top of engine heads.

As a job-setter, Smith was expected to perform maintenance on Operation 40. On the day of her injury, Smith was wearing Tyvek coveralls and had her hair pulled back in a ponytail, as was her habit. GM provided the coveralls for workers, to help keep their personal clothing clean. GM did not require the employees to wear them. The coveralls have long, loose fitting sleeves and come in three sizes; small, medium, and large.

On February 9, 2000, a bushing broke on one of the spindle drills in Operation 40. Because this was not an unusual occurrence, job-setters had a normal procedure to follow in order to repair the bushing. Initially, the job-setter would attempt to repair the broken bushing herself. If that was unsuccessful, the job-setter would call a Skilled Trades employee for assistance. Smith was able to locate the broken bushing, but realized that she would be unable to repair it herself. She summoned Jason Caldwell, a Skilled Trades employee for assistance.

There are two methods used to shut off Operation 40. The first is to use the lockout/tagout procedure, which completely shuts down the Operation. The second is to turn the shutoff switch, which would not shut off all the power to the machine, allowing the spindle drills to continue spinning.

Operation 40 was surrounded by a six-foot high metal barrier with an entry gate. An employee could walk through this entry without having the machines turned off.

Prior to performing the lockout/tagout procedure, both Smith and Caldwell went inside the gate so that Smith could show him the broken bushing. However, before repairing the bushing, they shut off Operation 40 by using the lockout/tagout procedure. After the bushing was repaired, Smith restarted Operation 40. Although the spindle drills began to turn normally, the engine heads did not move down the line to be drilled, indicating that something was still not right with the Operation. With Caldwell looking on, Smith went inside the gate for a closer look at station 14, because the view of this area was obliterated by the barrier. The spindles continued to spin, because it was necessary for the machine to be on in order to determine the location of the jam. Once inside the gate, Smith used her flashlight to illuminate the machine in an effort to locate the problem. Not seeing the problem, she turned to walk away. However, a spindle drill which continued to turn became entangled with the sleeve of her Tyvek coveralls. Thereafter, her ponytail also became entangled in a turning spindle drill. As a result, Smith suffered severe injuries, including having her scalp removed from her head.

B. Procedural Background

This action was originally filed in Montgomery Court of Common Pleas in December of 2001. The case was removed by the defendant to Federal Court, pursuant to

28 U.S.C. § 1332, in January of 2002. The defendant filed a motion for summary judgment on May 28, 2003. Subsequently, the plaintiff was given oral notice that the court was planning on granting defendant's motion for summary judgment. Based on this information, the plaintiff filed a motion for reconsideration on September 25, 2003. However, the district court did not grant defendant's motion for summary judgment until March 22, 2004. The plaintiff then filed a renewed motion for reconsideration on April 26, 2004. The district court issued a decision overruling plaintiff's renewed motion for reconsideration on March 24, 2005. This appeal followed.

II. JURISDICTION

The district court exercised subject matter jurisdiction under 28 U.S.C. § 1332, because the proper parties are citizens of different states and the amount in controversy exceeds $75,000.[1] This court has jurisdiction pursuant to 28 U.S.C. § 1291, because this is an appeal of the district court's March 24, 2005, order denying plaintiff's motion for reconsideration, which order left unchanged the final order granting defendant's motion for summary judgment entered on March 22, 2004.

This court reviews de-novo a district court's grant of summary judgment. *Johnson v. Karnes*, 398 F.3d 868, 873

1. The district court found that plaintiffs fraudulently joined Cheryl McCurdy as Plant Manager in order to spoil diversity. McCurdy was not a party to the original complaint. Plaintiffs have not appealed this finding, and McCurdy is not a party to this appeal. *See Smith v. GM*, 02-CV-00029-WHR at 2, n. 2.

(6th Cir. 2005). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); accord *Johnson*, 398 F.3d at 873. When deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Muhammad v. Close*, 379 F.3d 413, 416 (6th Cir. 2004). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original).

III. ANALYSIS

A. Issues on Appeal

The parties advance three issues on appeal. First, Smith avers that the district court erred in finding that there were no issues of material fact as to whether GM knew with "substantial certainty" that Smith's injuries were likely to occur, as is required for a finding of employer intentional tort. Second, Smith also claims that the court erred in not construing the evidence presented in the light most favorable to her, the non-movant, as required by Fed. R. Civ. P. 56.

Third, GM advances an alternate theory of affirmance; stating that GM never required plaintiff to perform any task with the knowledge that injury was substantially certain to occur.

B. Ohio Law Governing Employer Intentional Tort

A federal court exercising jurisdiction pursuant to 28 U.S.C. § 1332 must apply the substantive law of the forum state. *See U.S. v. Jandro*, 167 F.3d 309, 313 (6th Cir. 1999). In Ohio, employees injured in the course of their employment are usually limited to the remedial measures afforded by the Ohio Workers's Compensation Act. *See* O. Const. II § 35, *see also* Ohio Rev. Code Ann. § 4123 *et seq.* There are certain instances when an employee may seek redress for an injury outside of the Act. An injury caused by the intentional tort of the employer is such an event. *See Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 572, 576 (Ohio 1982) (explaining that an employee is not precluded from pursuing common law remedies for an intentional tort committed by his employer). In *Fyffe v. Jeno's*, 59 Ohio St.3d 115, 570 N.E.2d 1108, 1112 (Ohio 1991), the Supreme Court of Ohio set out the test used to determine whether an employer has committed an intentional tort. In such a case, the plaintiff must prove:

> 1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
>
> 2) knowledge by the employer that if the employee is subjected by his employment to such a dangerous process, procedure, instrumentality, or condition,

> then harm to the employee will be a substantial certainty; and
>
> 3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

Id. at 1112.[2] According to *Fyffe*, a plaintiff must offer proof beyond that required for negligence, or recklessness. *Id.* In the absence of direct evidence of intent, a plaintiff may prove such a claim by inferred intent. *Id.*

Ohio law creates a harsh test for establishing employer liability for an intentional tort. *See Goodwin v. Karlshamns U.S.A., Inc.*, 85 Ohio App.3d 240, 619 N.E.2d 508, 512 (Ohio

2. The Ohio legislature passed R.C. 2745.01, effective October 20, 1993. This legislation was intended to revise the requisite elements and standards of an employer intentional tort. However, the statute was found to be unconstitutional, because it imposed excessive standards and a heightened burden of proof for plaintiffs seeking a remedy for an employer intentional tort. *See Johnson v. B.P. Chemicals, Inc.*, 85 Ohio St.3d 298, 707 N.E.2d 1107 (Ohio 1999) ("Because R.C. 2745.01 imposes excessive standards (deliberate and intentional act), with a heightened burden of proof (clear and convincing evidence), it is clearly not a "law that furthers the' . . . comfort, heath, safety, and general welfare of all employees." ' *Id.* at 1114 (citation omitted). Since that time, the Ohio legislature repealed R.C. 2745.01 and passed H.B. 498, revising R.C. 2745.01 effective April 4, 2005. The revised statute is less stringent than the former. Because the injury in this case occurred in the year 2000, there are no controlling statutes, and *Fyffe* and its progeny control our determination.

App.1993) (stating "a reckless tort is not sufficient to allow recovery against one's employer"). In *Jandro v. Ohio Edison Co.*, the Sixth Circuit stated "it must be shown that the employer '(1) specifically desired to injure the employee; or (2) knew that injury to an employee was certain or substantially certain to result from the employers act, and despite this knowledge, still proceeded.' " 167 F.3d 309, 313 (6th Cir. 1999) (quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753, 756 (Ohio 1988)). It is not enough that harm was likely to occur, or that there was a high risk that it would occur. *Jandro*, 167 F.3d at 313. Acts of an employer that have a high risk of harm are most often reckless acts, but could under certain circumstances "equate to one that is substantially certain to result in harm to the employee, and reasonably raise a justiciable issue of an intentional tort." *Fyffe*, 570 N.E.2d at 1111-12. The plaintiff must show, by a preponderance of the evidence, that the employer had "actual knowledge of the exact dangers which ultimately caused" injury. *Sanek v. Duracote Corp.*, 43 Ohio St.3d 169, 539 N.E.2d 1114, 1116-17 (Ohio 1989) (citation omitted).

C. Smith's Issues on Appeal

Smith asserts that the district court erred in finding that there were no issues of material fact that GM did not know with "substantial certainty" that Smith's injuries were likely to occur, and the court erred in not construing the evidence presented in the light most favorable to her, the non-movant, as required by Fed. R. Civ. P. 56. Because our analysis of the defendant's motion for summary judgment requires de novo

review, we must necessarily construe the record in the light most favorable to Smith. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Therefore, the analyses of these two issues are conflated.

Smith maintains that GM was substantially certain that her injury would occur because of her working conditions. She asserts that the barrier surrounding the spindle drills of Operation 40 was a "guard", and that GM required her to "circumvent" this guard in the performance of her duties as a job-setter. She states that because GM provided loose, Tyvek coveralls to their employees, and allowed employees working near rotating machinery to wear their hair in ponytails in contravention to GM's own safety policies, GM was substantially certain that the injury she suffered was likely to occur. In addition, the lack of ambient lighting in the area of the spindle drills required Smith to use a flashlight to investigate a problem with the transfer bar, and this forced her to be in close proximity to the operating and dangerous machinery.

Smith further asserts that GM was substantially certain that her injury would occur because a previous injury had occurred in 1993 to Randy Petit, another GM employee working at the Moraine Engine Plant. We consider these factors in turn, bearing in mind the stringent standard required for a finding of substantial certainty of injury in employer intentional tort cases.

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1) The barriers surrounding Operation 40's rotating spindles should be considered a "guard", and GM required circumvention of the "guard" in the performance of Smith's job duties.

Smith states that the mesh barriers surrounding Operation 40 should be construed as a guard, in keeping with the definition of a "guard" by the Industrial Commission of Ohio. The commission defines a guard as "the covering, fencing, railing or enclosure, which shields an object from accidental contact (*see* 'safety guard') ." Ohio Admin. Code 4123:1-5-01(B)(69). Smith asserts that GM management agreed that the mesh fencing with gate was considered a guard, with the gate portion being identified as a "swing guard". She states that because the mesh fencing with a swing guard was a "guard", GM's requirement that she "circumvent" the guard in order to perform her tasks as a job-setter created an issue of material fact as to whether GM committed an employer intentional tort.

The district court correctly found that the evidence proffered by Smith concerning the "guard" failed to raise a genuine issue of material fact on the second prong of the *Fyffe* test. The court stated "[t]he essential fact supporting the conclusion that there was a genuine issue of material fact on the substantial certainty prong in *Fyffe* was that the employer had removed a safety guard which permitted the plaintiff to be injured. Herein, there is no suggestion that the Defendants removed a safety guard from operation 40 or did anything remotely similar to the actions of the employer in Fyffe." *Smith v. GM, et al*, No.02 -CV-00029-WHR at 13, n. 10 (hereinafter "slip op.").

Smith relies on *Fyffe* to assert that the "removal" of a safety guard by an employer creates an issue of material fact, because a jury could conclude that an injury was substantially certain to occur once the guard was removed, and the intent required for an employer intentional tort could be inferred from such an action. In *Fyffe*, a Plexiglas safety guard designed to prevent individuals from getting their hands caught in a moving conveyer belt was routinely removed prior to cleaning the conveyer. *Fyffe*, 570 N.E.2d at 1113. Although the machinery was not supposed to run while the guard was removed for cleaning, Fyffe was taught by his supervisor to clean with the conveyer moving, because it expedited the cleaning process. *Id.* at 1114. It was during this cleaning process that *Fyffe*'s arm was pulled into the conveyer and he suffered severe injuries. *Id.* at 1110. The court found that the removal of the Plexiglas safety guard and the employer's instruction that the conveyer should be run during the cleaning process raised an issue of material fact as to whether the employer committed an intentional tort. *Id.* at 1113-14.[3]

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3. Smith also relies on the unpublished case, *Jones v. Bryan Canning Co.*, No. WM-97-4466, 1998 Ohio App LEXIS 708 (Ohio Ct.App. Feb. 27, 1998) for the proposition that the removal of a safety guard raises an issue of material fact as to whether an employer has committed an intentional tort. In *Jones*, the plaintiff was taught to clean an auger with towels while the auger was moving. *Jones* at *2. "In order to be able to insert the rolled up towels, appellant was told to remove the cover on a 'nip point',an area usually enclosed because of its potential for injury to persons working around the auger. A warning label, which originally illustrated that the auger should not be engaged while the nip point cover was off had been

(Cont'd)

Smith compares the entry into the mesh fencing surrounding Operation 40 through the swing guards to the circumvention of the guards in both *Fyffe* and *Jones*. "Appellee subjected Linda Smith and her co-workers to the dangers of the revolving spindles by requiring them to circumvent the safety guard and troubleshoot within close proximity of same." (Appellant Br. 27) Yet, the deposition testimony of Peter Buczek, a GM safety supervisor describes the metal fencing as an "awareness barrier." When asked to define an awareness barrier, Buczek stated: "[a] practical definition is it was a guard that would prevent somebody from going into the hazard area inadvertently. And to access the area to do troubleshooting they would have to open the device, making them aware that they were entering an area that could be hazardous if it was operating." (Buczek Dep. JA 557) Smith herself stated that entry into the fenced area was sometimes necessary in order to view the transfer bar and see where it was jammed. (Smith Dep. JA 683) "The reason it was necessary for power to the equipment to remain on while troubleshooting a jam up was because if the power was not on to the transfer bars the fingers that held the engine head would drift down and no longer be in contact, rendering it impossible to see where the jam up existed." (Appellant Br. 7)

(Cont'd)

partially obliterated due to wear and tear and cleaning of the machine. . . ." *Id.* Further, the management acknowledged that it had never advised the staff about the dangers of the towel cleaning method, or circumventing the "nip points". *Id.* at 3.

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Unlike the cleaning procedures in both *Fyffe* and *Jones*, entry through the barrier was the only way a problem involving the transfer bar could be diagnosed. (Appellee Br. 4-10) The procedure involved visualizing the machinery from a distance of about two feet. At no time did anyone instruct Smith to insert any part of her body into the rotating spindles or moving machinery, in contrast to *Fyffe* or *Jones*. Smith readily admitted that she understood the dangers of being in proximity to moving pieces of machinery, that it was "common sense." (Smith Dep. JA 683) Further, Smith attended regular safety training at GM. (Smith Dep. JA 671-80)

Even assuming the mesh fencing with the "swing guard" was a guard within the terms of the Ohio Administrative Code, there is no evidence in the record that the guard was removed by GM management, nor did GM management instruct the employees to circumvent the guard. In fact, GM management routinely entered the area through the "swing guard" to visualize the machinery. (Smith Dep. JA 683) The district court properly noted that "the defendant's affirmative act must be more than merely passively condoning practices and procedures, which, in hindsight, subject employees to a greater risk of harm. That may be negligence or even recklessness, but it does not constitute the inferred intent which is required by *Fyffe*." *Smith*, slip op. at 14.

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2) GM provided loose fitting long sleeved Tyvek coveralls and allowed women to work around rotating machinery with their hair in ponytails in direct contravention to GM's own safety requirements. In addition, the lack of adequate ambient lighting in the work area required Smith to use a flashlight and get in closer proximity to the dangerous equipment.

Smith acknowledged that the Tyvek coveralls provided by GM for the employees were intended to protect the workers personal garments, and GM did not require that employees wear the garments. (Smith Dep. JA 676) The employees themselves could choose the appropriate size from small, medium, or large. *Id.* at 678. Smith personally selected a size large coverall to wear. *Id.* She argues, however, that the size of the garment she chose was immaterial, because the danger arose because of the loose fitting long sleeves. (Appellant Final Br. 19) She points out that wearing loose garments and long sleeves is in direct contravention to the GM safety rules, which state: "the wearing of loose clothing, long sleeves, neckties, bracelets, necklaces, wristwatches, or similar jewelry is not permitted while working around revolving machinery." (GM Powertrain Assembly Plant general safety rules and practices; JA 513-514) The rules also state "[w]here there is a danger of long hair being caught in the moving machinery or equipment, caps or hair nets must be worn or hair must be tied back." (JA 517) Smith asserts that because GM knew she was required to work near rotating machinery in a poorly lit area, wearing loose fitting coveralls with her hair in a ponytail, they knew with substantial certainty that the injury she had was likely to occur.

The district court correctly found that these working conditions did not raise an issue of material fact as to whether GM knew to a substantial certainty that Smith's injury would occur. Under Ohio law, GM's failure to prohibit its employees from wearing loose fitting coveralls and ponytails while working in decreased ambient lighting is not egregious enough to find that GM had the inferred intent required for an intentional tort. In *Jandro v. Ohio Edison*, the court stated that evidence beyond that which is required for both negligence and recklessness is required to establish an intentional tort by an employer. 167 F.3d 309, 313 (6th Cir. 1999) (citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753, 756 (Ohio 1988)). In *Mitchell*, the Ohio Supreme Court found that "mere knowledge of a risk falls short of substantial certainty and does not by itself establish intent." *Id.* at 753. The court stated:

> When the employer acts despite the knowledge of some risk, the employer's conduct may be negligent. When the risk is great and the probability increases that certain consequences may follow, the employer's conduct may be reckless. As the probability that certain consequences will follow further increases and the employer knows that injury to employees is certain, or substantially certain, to result from his act, and he still proceeds, he is treated by the law as if he had in fact desired to produce the result.

Id. at 755, quoting *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (Ohio 1988) (paragraph

six of the syllabus), and *Kunkler v. Goodyear Tire & Rubber Co.*, 36 Ohio St.3d 135, 522 N.E.2d 477, 481 (Ohio 1988)

In *Jandro*,, an electrical lineman was electrocuted while engaging in a dangerous procedure known as "sliding the ground". 167 F.3d at 312. This procedure was sometimes used by experienced lineman, but was never supposed to be done without a special "hot-line" tool, according to the employer's safety guidelines. *Id.* While the court found that management was at least constructively aware of several safety violations, including the failure to hold a required safety meeting prior to beginning the job, the use of a lift machine with controls that were not working, and inadequately trained crew members, the court found that the management could not be substantially certain that Jandro's death would have occurred. In so deciding, the court stated:

> The district court was correct when it wrote that "the intentional tort exception to the Workers' Compensation Act . . . [encompasses] a particular scenario under *Fyffe*: one in which the employer is virtually certain that harm is about to occur but chooses to 'look the other way' in the interest of continuing the job. One might describe this scenario as one in which the employer takes a stance of 'active ignorance' or even 'willful blindness' in the face of an assured danger.

Id. at 316 (6th Cir. 1999). Based on *Jandro*, the mere knowledge of a safety violation or a dangerous condition is not enough to support a finding of an employer intentional tort. "Even if [defendant] knew of and appreciated the risks

. . . the violations involved were not substantially certain to cause an accident." *Jandro*, 167 F.3d at 315.

Further in *Sanek v. Duracote Corp.*, the Ohio Supreme Court stated;

> There are many acts within the business or manufacturing process which involve the existence of dangers, where management fails to take corrective action, institute safety measures, or properly warn the employees of the risks involved. Such conduct may be characterized as gross negligence or wantonness on the part of the employer. However, in view of the overall purposes of our Workers' Compensation Act, such conduct should not be classified as an 'intentional tort', and therefore an exception, under *Blankenship* or *Jones* to the exclusivity of the Act.

43 Ohio St.3d 169, 539 N.E.2d 1114, 1117 (Ohio 1989) (quoting *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489, 504-05 (Ohio, 1988)). Thus, even if GM knew that wearing coveralls and ponytails was contrary to their safety policies, and the ambient lighting required the use of a flashlight to visualize machinery, we agree with the district court that GM was not substantially certain that the injury Smith suffered was going to occur.[4]

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4. An employer's failure to follow documented safety procedures does not necessarily infer a finding of a substantial certainty of injury. *See Edsall v. Hose Master, Inc.*, 1997 Ohio App. LEXIS 5697 (Ohio Ct.App.1997) (Despite the employer instructing

(Con'd)

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3) The trial court failed to acknowledge the presence of a prior similar incident, and failed to construe the facts of the prior incident in the light most favorable to Smith.

According to Smith, "a prior incident did in fact occur when another employee also became entangled. The prior incident involved loose clothing being caught in the revolving spindles of the spindle machine when the employee circumvented a guard to perform repair work." (Appellant Br. 20) Randy Pettit, an employee at the Moraine plant was injured in 1993, seven years prior to the injury sustained by Smith. Pettit was working on a multi-spindle drilling machine on Operation 20, an operation that bored holes in bearing caps. (Pettit Dep. JA 644) Pettit testified, "I reached in to move a coolant line and the drills caught around my stomach, around my coveralls, around my stomach and it just wound up." *Id.* Pettit suffered injuries requiring him to be off of work for approximately 10 weeks. *Id.* Smith relies on this accident to show that GM had knowledge of a prior incident, and therefore, GM knew to a substantial certainty that her injury would occur.

The district court found that Pettit's injury was caused by his reaching into the machine to move a coolant line, which caused his coveralls to be caught in the drills. *See Smith*, slip op. at 16. We agree. Pettit was not trying to

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(Con'd)

the employee to make adjustments to a machine while it was still running, in contravention of required safety procedures, the court found no substantial certainty of injury when the employee's hand slipped into the operating machine and she was injured.).

visualize a transfer bar in darkened surroundings when the loose sleeve of his coverall was caught in the machine, as was the case with Smith. When asked if his coveralls were loose or hanging, as Smith avers, he replied, "No. Not really. I mean I just got too close to the drill." (Pettit Dep. JA 644)

To establish that an employer knew with substantial certainty that an injury would occur, "[t]he plaintiff has the burden of proving by a preponderance of the evidence that the employer had "actual knowledge of the *exact dangers* which ultimately caused injury." *Sanek*, 539 N.E.2d at 1117. Even viewing Pettit's injury in the light most favorable to Smith, it simply does not support a finding that Pettit's injury gave GM prior notice of the *exact dangers* that Smith claims caused her injuries. In fact, loose coveralls, the lack of adequate ambient lighting, and wearing a ponytail had *nothing* to do with Mr. Pettit's injuries, according to his own deposition testimony. Therefore, the district court was correct in finding that Pettit's injury was not a prior incident that would cause GM to have substantial certainty that Smith's injury would occur.

D. GM's Issue on Appeal

Having found that the district court correctly decided that there are no issues of material fact as to whether GM knew with substantial certainty that Smith would be injured under the second prong of *Fyffe*, it is unnecessary to evaluate GM's claim of an alternate ground for affirmance.

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IV. CONCLUSION

For the aforementioned reasons, the opinion of the district court granting summary judgment to the defendant, GM, is AFFIRMED.

APPENDIX B — DECISION AND ENTRY OVERRULING PLAINTIFFS' RENEWED MOTION FOR RECONSIDERATION (DOC. #80) OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED MARCH 24, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:02cv029

LINDA SMITH, et al.,

Plaintiffs,

vs.

GENERAL MOTORS CORP., et al.,

Defendants.

JUDGE WALTER HERBERT RICE

DECISION AND ENTRY OVERRULING PLAINTIFFS' RENEWED MOTION FOR RECONSIDERATION (DOC. #80), TREATED AS A TIMELY MOTION TO ALTER OR AMEND JUDGMENT FILED IN ACCORDANCE WITH FED. R. CIV. P. 59(e); CASE REMAINS TERMINATED

Appendix B

The Plaintiffs brought this action to obtain compensation for the harm they suffered when Plaintiff Linda Smith was severely injured while working at the Powertrain Division plant of General Motors Corporation ("GM"), located in Moraine, Ohio, on February 9, 2000. In the Complaint, Linda Smith set forth a claim of intentional tort against her employer, the Defendants, pursuant to *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 572, cert. denied, 459 U.S. 857 (1982). Her husband, Gregory Smith, sought to recover with a claim of loss of consortium. In its Decision of March 22, 2004 (Doc, #78), the Court, *inter alia*, sustained the Defendants' Motion for Summary Judgment (Doc. #37) and directed that judgment be entered in favor of Defendants and against Plaintiffs. Therein, the Court also overruled, without prejudice to renewal, Plaintiffs' Motion for Reconsideration (Doc. #75).[1]

This case is now before the Court on the Plaintiffs' Renewed Motion for Reconsideration (Doc. #80), which is construed as a timely motion to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure. *See Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 206 (6th Cir. 1990) (holding that motions for reconsideration are construed as motions to alter or amend the judgment, if timely under Rule 59(e)); *Huff v. Metropolitan Life Insurance Co.*, 675 F.2d 119, 122 (6th Cir. 1982) (noting that a motion for reconsideration filed within the time proscribed by Rule 59(e) is treated as a motion to alter or amend

1. The Plaintiffs filed that motion, after the Court had announced to counsel that it would sustain the Defendant's request for summary judgment, but before it had issued its Decision of March 22, 2004 (Doc. #78).

judgment). Therein, the Plaintiff argues that the Court erroneously granted Defendants' Motion for Summary Judgment. As a means of analysis, the Court will initially set forth the facts and circumstances giving rise to this litigation, following which it will briefly set forth the standards it must apply when it rules upon a motion brought pursuant to Rule 59(e). Finally, the Court will address the arguments raised by the Plaintiffs in their motion.[2]

In its Decision of March 22, 2004, this Court set forth those facts and circumstances:[3]

> The facts and circumstances giving rise to Linda Smith's claim are not in dispute. Linda Smith was hired by GM to work at its Powertrain

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2. The Defendants argue that the Plaintiffs' renewed request for reconsideration constitutes the third time that they have brought certain issues before the Court. According to Defendants, the Plaintiffs initially presented those arguments in their opposition to Defendants' request for summary judgment, and presented them a second time in their Motion for Reconsideration (Doc. #75). Accepting for present purposes that the Plaintiffs twice previously presented each of the arguments contained in the motion now under consideration, this will not be the third time in which this Court has addressed those arguments. In it's Decision of March 22, 2004 (Doc. #78), the Court overruled Plaintiffs' request for reconsideration, without addressing the merits of that request, because Plaintiffs filed it before the Court had issued its Decision overruling Defendants' Motion for Summary Judgment (Doc. #37).

3. Since this litigation was then before the Court on the Defendants' Motion for Summary Judgment (Doc. #37), those facts and circumstances were set forth in the manner most favorable to the Plaintiffs.

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Division plant in Moraine, Ohio, in 1993. She began her employment on an assembly line. After working on an assembly line for about six years, Linda Smith became a job setter, a position she had held for about one and one-half years before she was injured. On the day of the accident, and for the previous two months, Linda Smith had been working on a machine head line called Operation 40, which was an automated assembly line composed of 14 stations or machines.

There are two methods to shut off Operation 40. The first would be to utilize the lockout/tagout procedure, which would ensure that the machine would not operate its automatic cycles with stored residual power, after having been shut off. The second method was to turn the shutoff switch. That method would not cut off all energy to the machine, which could continue to operate. Linda Smith not only received extensive training on the use of the lockout/tagout procedure, including the need to use that procedure, but had used it on numerous occasions.

Each station or machine of Operation 40 drilled holes into a metal engine head, using spindle drills which operated in unison in three positions, to wit: 1) the first position, under which the drills were extended furthest from the machine performing their function of boring holes in an engine block; 2) the second position, with the drills slightly retracted from the engine head ready

to begin boring; and 3) the third or tool position, with the drills fully retracted from the engine head. When a drill was in the tool position, it would be one to two feet from the engine head so that parts could be changed. When Operation 40 was shut off using the lockout/tagout procedure, the drills automatically returned to the tool position. When the other method of shutting off Operation 40 was utilized, the drills would merely stop in the position in which they were.

Operation 40 was surrounded by a six foot high metal barrier. The barrier had a gate, through which an employee could walk in order to work on its 14 stations or machines. Once one walked through the gate, there was no additional guard which would prevent her from coming into contact with the spindle drills. The gate did not have a feature which would automatically shut off Operation 40, in a manner similar to the lockout/tagout procedure, when someone walked through it.

Defendants made Tyvek coveralls available to their employees, which they could wear over their own personal clothes in order to protect their clothing from grease and other substances. The Defendant did not, however, require employees to wear that type of clothing. The Tyvek coveralls have long, loose fitting sleeves. Linda Smith typically wore these coveralls over her clothes. They came in three sizes, to wit: small, medium and large.

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On February 9, 2000, Linda Smith began her shift at 5:00 a.m. As usual, she wearing Tyvek coveralls and had her hair pulled into a ponytail. As she had for the previous two months, she was working as a job setter on Operation 40, which required that she perform maintenance on its machines. After she had been at work for several hours, a bushing broke on one of the drills in a machine of Operation 40. Because a broken bushing was not an unusual occurrence, job setters had a normal procedure they followed to fix the problem. Initially, the job setter, such as Linda Smith, would attempt to repair the broken bushing herself. If that was unsuccessful, the employee would then call a Skilled Trades employee for assistance. On February 9th, although Linda Smith was able to locate the broken bushing, she realized that she could not repair it by herself. Therefore, she summoned Jason Caldwell ("Caldwell"), a Skilled Trades employee, for assistance. Prior to performing the lockout/tagout procedure, both Linda Smith and Caldwell went inside the gate so that she could show him the broken bushing. However, before repairing the broken bushing, they shut off Operation 40 by using the lockout/tagout procedure.

After the broken bushing had been repaired, Linda Smith restarted Operation 40. Although the spindle drills began to turn as normal, the engine heads did not move down the line to be drilled, which indicated that something was still amiss.

> As a consequence, Linda Smith and Caldwell each took a side of the line to view the stations in order to look for the problem. At that time, since Operation 40 was not locked out, there was still power to the machines. After having viewed 13 stations from outside the gate, Linda Smith felt it necessary to go inside the gate for a closer look, when she got to station 14. Once inside the gate, she used her flashlight to illuminate the machine in an effort to locate the problem. Not seeing the problem, Linda Smith turned to walk away. However, a spindle drill which continued to turn, since the power had not been shut off using the lockout/tagout procedure, became entangled with the sleeve of her Tyvek coveralls. Thereafter, her hair which was in a ponytail also became entangled in a turning spindle drill. As a result, Linda Smith suffered severe injuries, including having her scalp removed from her head.

Doc. #78 at 2-5 (footnote omitted).

In *GenCorp., Inc. v. American International Underwriters*, 178 F.3d 804 (6th Cir. 1999), the Sixth Circuit set forth the instances in which a court could alter or amend a judgment under Rule 59(e):

> Motions to alter or amend judgment may be granted if there is a clear error of law, *see Sault Ste. Marie Tribe* [*of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)], newly discovered evidence, *see id.*, an intervening

> change in controlling law, *Collison v. International Chem. Workers Union*, Local 217, 34 F.3d 233, 236 (4th Cir. 1994); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90-91 n. 3 (1st Cir. 1993); *School District No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), or to prevent manifest injustice. *Davis* [*v. Jellico Community Hosp. Inc.*, 912 F.2d 129, 133 (6th Cir. 1990)]; *Collison*, 34 F.3d at 236; *Hayes*, 8 F.3d at 90-91 n. 3. *See also North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).

Id. at 834. *Accord, Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 248 (6th Cir.), *cert. denied*, 534 U.S. 822 (2001). In *S Industries, Inc. v. Centra 2000, Inc.*, 249 F.3d 625 (7th Cir. 2001), the Seventh Circuit explained that a District Court has not committed clear error, unless its decision strikes the appellate court as being wrong "with the force of a 5 week old, unrefrigerated, dead fish." *Id.* at 627. Herein, there has not been a change in the law, nor have the Plaintiffs cited newly discovered evidence. In addition, even though Plaintiffs contend that the Court erroneously granted summary judgment in favor of Defendants, they do not argue that this Court's Decision of March 22, 2004, constituted a clear error of law, as that phrase was elaborated upon in *S Industries*. The Plaintiffs merely argue that the Court erroneously sustained the Defendants' Motion for Summary Judgment. The Court will assume for present purposes that erroneously entering summary judgment against a party would constitute a manifest injustice and that, therefore, it is necessary to consider the issues raised by the Plaintiffs

in their motion in order to ensure that a manifest injustice does not occur. In their memorandum opposing the Plaintiffst motion, Defendants argue that the Plaintiffs should not be permitted to utilize Rule 59(e) to relitigate arguments that the Court has previously rejected. In support thereof, Defendants rely upon *U.S. ex rel. American Textile Manufacturers Institute v. The Limited, Inc.*, 179 F.R.D. 541 (S.D.Ohio 1997), wherein Judge Sandra Beckwith indicated in a footnote that Rule 59(e) is not a means to relitigate previously decided issues and that an appeal is the proper recourse for a party simply wishing to regurgitate previously presented arguments. *Id.* at 147 n. 9. In that same footnote, however, Judge Beckwith exercised her discretion and permitted plaintiff to reargue previously rejected arguments. Similarly, herein, the Court will reconsider the arguments of Plaintiffs, even though they were previously rejected. Nevertheless, to the extent that it continues to disagree with Plaintiffs that the evidence raises a genuine issue of material fact, it will not write at length to explain its disagreement a second time. Accordingly, the Court turns to the merits of the Plaintiffs' motion.

Plaintiffs argue that the Court should reconsider its Decision granting summary judgment to the Defendants because the evidence raised genuine issues of material fact on the following questions, to wit: 1) the barrier surrounding Operation 40 was a guard, without which an employee would be unprotected from the rotating spindles on that machine; 2) working inside the guard exposed the employee to an unreasonable risk of harm; 3) GM trained and required its employees to circumvent the safety barrier on Operation 40; and 4) GM violated its safety rules pertaining to employees

wearing loose clothing and having long hair, thereby increasing the risk of harm to its employees. The Plaintiffs also contend that the affidavit from their expert witness, Gerald Rennell ("Rennell"), when considered in the context of his deposition, creates a genuine issue of material fact.[4]

Normally, an employee is prohibited from prosecuting an action against her employer and must, instead, seek compensation under the Ohio Workers Compensation Act. *See e.g.*, Ohio Constitution, Art. II, § 35, and Ohio Rev. Code § 4123.74. The Ohio Supreme Court, however, has recognized that an employer is liable for intentional torts committed upon its employees in the workplace. *See e.g.*, *Blankenship, supra.* In the absence of direct evidence of intent, a plaintiff may prove such a claim by inferred intent. *Fyffe v. Jeno's Inc.*, 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991). Therein, the Ohio Supreme Court defined, in paragraph 1 of the syllabus, the "intent" necessary to support such a claim:

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4. In addition, Plaintiffs take umbrage with this Court's statement in its prior decision to the effect that in order to survive a motion for summary judgment on the second prong of the *Fyffe* test, Ohio courts have generally required evidence of a substantially similar prior accident or a specific affirmative act by the defendant, such as removing a safety guard. In support of their criticism of that statement, Plaintiffs cite *Jones v. Bryan Canning Co.*, 1998 WL 102128 (Ohio App. 1998). Therein, the appellate court reversed the award of summary judgment in favor of the employer in a workplace, intentional tort case. The plaintiff had been injured when her hand and forearm were caught in a dry mix auger that she was cleaning. She had been taught to clean the auger by rolling up seven towels and placing them inside the auger while it was operating. In *Jones* unlike this litigation, another employee had been injured cleaning another auger.

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> 1. Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed. 1984), in order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)

Although the Defendants argued that they were entitled to summary judgment on the second and third prongs of the three-part analysis set forth in *Fyffe*, the Court found it necessary only to address the second prong of that test, concluding that the evidence failed to raise a genuine issue of material fact concerning it.

In paragraph 2 of the syllabus of *Fyffe*, the Ohio Supreme Court elaborated upon that element (i.e., that harm to the employee will be a substantial certainty):

> 2. To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not [sufficient inferred] intent. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph six of the syllabus, modified as set forth above and explained.)

59 Ohio St.3d at 115, 570 N.E.2d at 11 10.

Simply stated, assuming for present purposes that the evidence raises genuine issues of material fact concerning each of the four questions posed by Plaintiffs, which the Court has set forth above, the evidence nevertheless fails to raise a genuine issue of material fact on the second prong of the *Fyffe* test (i.e., "knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm

to the employee will be a substantial certainty"). Moreover, in its Decision of March 22, 2004, the Court addressed and rejected the Plaintiffs' argument that the evidence raised a genuine issue of material fact on the second prong of *Fyffe*, because GM employees were regularly required to work behind the barrier that shielded Operation 40, troubleshooting in inadequate light, which exposed them to the risk of being injured by the rotating spindles on that machine, a risk that was increased as a result of GM neglecting to enforce its safety rules concerning employees' clothes and hair. Doc. #78 at 14-17. Nothing cited by the Plaintiffs' in their Motion for Reconsideration causes this Court to conclude that it erred in that regard.

In its Decision of March 22, 2004, the Court concluded that the affidavit submitted by Rennell failed to raise a genuine issue of material fact, because the statements therein failed to comply with Rule 56(e), which in relevant part provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

In *Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 598-99 (6th Cir. 1999), the Sixth Circuit applied that part of Rule 56(e) in an action in which the plaintiff, a registered nurse,

alleged that the defendant had violated the ADA by failing to accommodate her disability by permitting her to work eight rather than twelve-hour shifts. The District Court granted summary judgment to the defendant, and the plaintiff appealed. The issue facing the Sixth Circuit was whether the evidence raised a genuine issue of material fact on the question of whether the plaintiff was disabled under the ADA. In particular, the plaintiff argued that such a genuine issue of material fact was raised by the statements in the affidavit of her vocational expert, who had opined that her impairments prevented her from engaging in most jobs in the national and regional economies as a registered nurse. The Sixth Circuit rejected the argument, writing that the statements in the vocational expert's affidavit were "merely conclusory, restating the requirements of the law, and therefore cannot create a genuine issue of material fact sufficient to defeat a motion for summary judgment." *Id.* at 599. In its earlier opinion, this Court noted that the conclusory statements in Rennell's affidavit merely restated the requirements of the second prong of the *Fyffe* test.

Plaintiffs now contend that Rennell's deposition cures any deficiencies in his affidavit. Since the Plaintiffs did not cite that deposition, at all, in their opposition to the Defendants' request for summary judgment, the Court will not permit them to rely upon it at this point in order to alter the conclusory nature of Rennell's affidavit and, thereby, to create a genuine issue of material fact. In *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990), the Sixth Circuit held that, in ruling on a motion for summary judgment, "[a] district court is not . . . obligated to wade through and search the entire record

for some specific facts that might support the nonmoving party's claim." *Id.* at 111. *See also L.S. Heath & Son. Inc. v. AT&T Information Systems, Inc.*, 9 F.3d 561 (7th Cir. 1993); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 n. 7 (5th Cir.), *cert. denied*, 506 U.S. 832 (1992) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. . . .").

Based upon the foregoing, the Court overrules the Plaintiffs' Motion for Reconsideration (Doc. #80).

The captioned cause remains terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

March 24, 2005

/s/ Walter Herbert Rice
WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C — DECISION AND ENTRY IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISRICT OF OHIO DATED MARCH 22, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:02cv029

JUDGE WALTER HERBERT RICE

LINDA SMITH, et al.,

Plantiffs,

vs.

GENERAL MOTORS CORP., et al.,

Defendants.

JUDGE WALTER HERBERT RICE

DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. #37); DECISION AND ENTRY SUSTAINING PLAINTIFFS' MOTION FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF 20 PAGES (DOC. #45); DECISION AND ENTRY OVERRULING DEFENDANTS' MOTION TO STRIKE (DOC. #46); DECISION AND ENTRY OVERRULING PLAINTIFFS' MOTION TO STRIKE (DOC. #53); DECISION AND ENTRY OVERRULING, AS MOOT, DEFENDANTS' MOTION IN LIMINE (DOC. #55); DECISION AND ENTRY OVERRULING, AS MOOT,

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DEFENDANTS' MOTION IN LIMINE (DOC. #56); DECISION AND ENTRY OVERRULING, AS MOOT, DEFENDANTS' MOTION IN LIMINE (DOC. #57); DECISION AND ENTRY OVERRULING, AS MOOT, JOINT MOTION TO CONTINUE (DOC. #60); DECISION AND ENTRY SUSTAINING PLAINTIFFS' MOTION FOR PARTIAL RELIEF FROM JULY 21, 2003, DISCOVERY ORDER (DOC. #68); DECISION AND ENTRY OVERRULING, WITHOUT PREJUDICE TO RENEWAL, PLAINTIFFS' MOTION FOR RECONSIDERATION (DOC. #75); JUDGMENT TO BE ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS; TERMINATION ENTRY

The Plaintiffs bring this action to obtain compensation for the harm they suffered when Plaintiff Linda Smith was severely injured while working at the Powertrain Division plant of General Motors Corporation ("GM"), located in Moraine, Ohio, on February 9, 2000. In the Complaint,[1] Linda Smith sets forth a claim of intentional tort against her employer, the Defendants,[2] pursuant to *Blankenship v.*

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1. A copy of Plaintiffs' Complaint is attached to Defendants' Notice of Removal (Doc. #1).

2. The Defendants are GM and the Powertrain Division of GM. The Plaintiffs also named Cheryl McCurdy ("McCurdy") as a Defendant. McCurdy was the manager of the Powertrain Division facility in which Linda Smith was employed. Other than alleging that McCurdy was the plant manager of the Moraine facility at which Linda Smith was employed and, as such, was ultimately responsible for the safety of the plant, Plaintiffs do not mention McCurdy in their Complaint. The Plaintiffs filed their Complaint in the Montgomery County Common Pleas Court, and the Defendants

(Cont'd)

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Cincinnati Milacron Chemicals, Inc., 69 Ohio St.2d 608, 433 N.E.2d 572, *cert. denied*, 459 U.S. 857 (1982).[3]

The facts and circumstances giving rise to Linda Smith's claim are not in dispute.[4] Linda Smith was hired by GM to work at its Powertrain Division plant in Moraine, Ohio, in 1993. She began her employment on an assembly line. After working on an assembly line for about six years, Linda Smith became a job setter, a position she had held for about one and one-half years before she was injured. On the day of the accident, and for the previous two months, Linda Smith had been working on a machine head line called Operation 40, which was an automated assembly line composed of 14 stations or machines.

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removed it to this Court on the basis of diversity of citizenship, even though Plaintiffs and McCurdy are all citizens of Ohio. The Defendants alleged that McCurdy had been fraudulently joined as a Defendant. *See* Doc. #1. Previously, this Court agreed with Defendants when it overruled Plaintiffs' Motion to Remand. *See* Doc. #10. Since the Court has concluded that the Plaintiffs fraudulently joined McCurdy, because they do not have a colorable claim against her, the Court will not discuss her further.

3. The other Plaintiff, Gregory Smith, brings a claim for loss of consortium, which the parties agree is derivative of Linda Smith's intentional tort claim. Therefore, if the Defendants are entitled to summary judgment on Linda Smith's claim, they are also entitled to same on that asserted by Gregory Smith. Conversely, denial of summary judgment on Linda Smith's claim will lead to the same result on her husband's claim of loss of consortium.

4. Since this case comes before the Court on Defendants' Motion for Summary Judgment (Doc. #37), the Court sets forth those facts and circumstances in the manner most favorable to the Plaintiffs.

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There are two methods to shut off Operation 40. The first would be to utilize the lockout/tagout procedure, which would ensure that the machine would not operate its automatic cycles with stored residual power, after having been shut off. The second method was to turn the shutoff switch. That method would not cut off all energy to the machine, which could continue to operate. Linda Smith not only received extensive training on the use of the lockout/tagout procedure, including the need to use that procedure, but had used it on numerous occasions.

Each station or machine of Operation 40 drilled holes into a metal engine head, using spindle drills which operated in unison in three positions, to wit: 1) the first position, under which the drills were extended furthest from the machine performing their function of boring holes in an engine block; 2) the second position, with the drills slightly retracted from the engine head ready to begin boring; and 3) the third or tool position, with the drills fully retracted from the engine head. When a drill was in the tool position, it would be one to two feet from the engine head so that parts could be changed. When Operation 40 was shut off using the lockout/tagout procedure, the drills automatically returned to the tool position. When the other method of shutting off Operation 40 was utilized, the drills would merely stop in the position in which they were.

Operation 40 was surrounded by a six foot high metal barrier. The barrier had a gate, through which an employee could walk in order to work on its 14 stations or machines. Once one walked through the gate, there was no additional guard which would prevent her from coming into contact with the spindle drills. The gate did not have a feature which

would automatically shut off Operation 40, in a manner similar to the lockout/tagout procedure, when someone walked through it.

Defendants made Tyvek coveralls available to their employees, which they could wear over their own personal clothes in order to protect their clothing from grease and other substances. The Defendant did not, however, require employees to wear that type of clothing. The Tyvek coveralls have long, loose fitting sleeves. Linda Smith typically wore these coveralls over her clothes. They came in three sizes, to wit: small, medium and large.

On February 9, 2000, Linda Smith began her shift at 5:00 a.m. As usual, she wearing Tyvek coveralls and had her hair pulled into a ponytail. As she had for the previous two months, she was working as a job setter on Operation 40, which required that she perform maintenance on its machines.[5] After she had been at work for several hours, a bushing broke on one of the drills in a machine of Operation 40. Because a broken bushing was not an unusual occurrence, job setters had a normal procedure they followed to fix the problem. Initially, the job setter, such as Linda Smith, would attempt to repair the broken bushing herself. If that was unsuccessful, the employee would then call a Skilled Trades employee for assistance. On February 9th, although Linda Smith was able to locate the broken bushing, she realized that she could not repair it by herself. Therefore, she summoned Jason Caldwell ("Caldwell"), a Skilled Trades employee, for assistance. Prior to performing the lockout/tagout procedure, both Linda Smith and Caldwell went inside

5. Plaintiffs refer to Linda Smith's duties as troubleshooting.

the gate so that she could show him the broken bushing. However, before repairing the broken bushing, they shut off Operation 40 by using the lockout/tagout procedure.

After the broken bushing had been repaired, Linda Smith restarted Operation 40. Although the spindle drills began to turn as normal, the engine heads did not move down the line to be drilled, which indicated that something was still amiss. As a consequence, Linda Smith and Caldwell each took a side of the line to view the stations in order to look for the problem. At that time, since Operation 40 was not locked out, there was still power to the machines. After having viewed 13 stations from outside the gate, Linda Smith felt it necessary to go inside the gate for a closer look, when she got to station 14. Once inside the gate, she used her flashlight to illuminate the machine in an effort to locate the problem. Not seeing the problem, Linda Smith turned to walk away. However, a spindle drill which continued to turn, since the power had not been shut off using the lockout/tagout procedure, became entangled with the sleeve of her Tyvek coveralls. Thereafter, her hair which was in a ponytail also became entangled in a turning spindle drill. As a result, Linda Smith suffered severe injuries, including having her scalp removed from her head.

This case is now before the Court on the Defendants' Motion for Summary Judgment (Doc. #37) and its Motion to Strike (Doc. #46), as well as the Plaintiffs' Motion to Strike (Doc. #53).[6] As a means of analysis, the Court will initially

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6. Plaintiffs' Motion for Partial Relief from July 21, 2003, Discovery Order (Doc. #68)is also pending. In that Discovery Order, Magistrate Judge Sharon Ovington, *inter alia*, afforded Plaintiffs

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rule upon the parties' Motions to Strike, following which it will turn to Defendants' Motion for Summary Judgment (Doc. #37).

I. Defendants' Motion to Strike (Doc. #46) and Plaintiffs' Motion to Strike (Doc. #53)

As a means of analysis, the Court will rule upon these two motions in the above order.

The Defendants have moved to strike the Plaintiffs' memorandum in opposition to the request for summary judgment.[7] *See* Doc. #46. The Defendants argue that the Court

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the opportunity of filing an affidavit under Rule 56(f) of the Federal Rules of Civil Procedure, setting forth the additional discovery they needed in order to respond to Defendants' Motion for Summary Judgment. *See* Doc. #65 at 18-20. With their Motion for Partial Relief from July 21, 2003, Discovery Order (Doc. #68), the Plaintiffs request that they not be obligated to file a Rule 56(f) affidavit, arguing that they had submitted sufficient evidence for the Court to rule on Defendants' Motion for Summary Judgment (Doc. #37). The opportunity of filing a Rule 56(f) motion was a benefit conferred upon Plaintiffs in the Discovery Order, which this Court will not require them to take advantage of if that is not their desire. Accordingly, the Court sustains Plaintiffs' Motion for Partial Relief from July 21, 2003, Discovery Order (Doc. #68).

7. The Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment has not been filed; rather, it is appended to Plaintiffs' Motion for Leave to File a Memorandum in Opposition of 20 Pages (Doc. #45). The Court sustains the Plaintiffs' motion, and their Memorandum in Opposition to the Defendants' Motion for Summary Judgment is deemed filed as Doc. #45. It has been considered by the Court in ruling on Defendants' Motion for Summary Judgment.

should strike the Plaintiffs' memorandum since that memorandum, which exceeds 20 pages, violates § I(G) of General Order No. 1, because Plaintiffs did not seek leave of Court to file a memorandum in excess of 20 pages more than 3 days before the date upon which that memorandum was due and, further, because they did not explain why a memorandum in excess of 20 pages was required. Although the Court agrees with Defendants that the Plaintiffs have violated § I(G) of General Order No. 1, that violation, in the absence of demonstrable prejudice, does not warrant the striking of the Plaintiffs' memorandum. Defendants do not even suggest that the Plaintiffs' noncompliance with General Order No. 1 has caused them to suffer prejudice. Accordingly, the Court overrules the Defendants' Motion to Strike (Doc. #46).

Attempting to demonstrate that turnabout is fair play, the Plaintiffs have moved to strike the Defendants' reply memorandum in support of their motion for summary judgment. *See* Doc. #53. The Plaintiffs argue that the Court should strike the reply memorandum, because the Magistrate's order of May 12, 2003 (Doc. #32), did not provide for the filing of such a memorandum and, further, since the Rules do not provide for the filing of such. Neither of those reasons provides a sufficient reason for striking the Defendants' reply memorandum.

First, this Court has traditionally accepted reply memoranda in support of motions for summary judgment. Indeed, it is the exceptional case in which such a memorandum is not filed. Perhaps, Magistrate Judge Ovington was unaware of this Court's common practice when

she entered an order which did not provide for the filing of a reply memorandum. Nevertheless, in the absence of an indication that the Magistrate Judge heard argument from the parties concerning the filing of such a memorandum and rejected such a filing, her failure to provide for same does not constitute a sufficient reason to overturn this Court's longstanding policy.

Second, Plaintiffs contend that the Court should strike the Defendants' reply memorandum, because the Local Rules do not provide for such. The Local Rules of this Court provide for the filing of reply memoranda. *See* S.D. Ohio Civ. R. 7.2(a)(2). However, the Plaintiffs rely upon the first paragraph of § I(F) of General Order No. 1 to argue that reply memoranda may not be filed in supports of motions for summary judgment. The first paragraph of § I(F) provides:

> Other than motions required by law to be set for a hearing, with notice given to all counsel, and motions which a specific request for a hearing has been made and granted by the Court, all motions shall be submitted without oral argument on the memoranda filed with the Clerk, on the schedule set forth in S.D. Ohio Civ. R. 7.2, unless otherwise ordered.

The Plaintiffs contend that, pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a hearing on a motion for summary judgment is mandatory and that, therefore, under the first paragraph of § I(F), the schedule set forth in S.D. Ohio Civ. R. 7.2, which authorizes the filing of reply memoranda, is inapplicable. Accordingly, Plaintiffs'

argument continues, a party may not file a reply memorandum in support of a motion for summary judgment. The fatal flaw in this argument is that Plaintiffs misread the first paragraph of § I(F), which addresses the question of when oral argument will be permitted on a motion, not when the filing of a reply memorandum is allowed.

Accordingly, the Court overrules Plaintiffs' Motion to Strike (Doc. #53).

II. Defendants' Motion for Summary Judgment (Doc. #37)

As an initial matter, the Court will set forth the standards which it must apply whenever a it rules upon a motion for summary judgment. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Of course, the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323. *See also Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (The moving party has the "burden of showing that the pleadings, depositions, answers to interrogatories,

admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial.") (quoting *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987)). The burden then shifts to.the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). Thus, "[o]nce the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial." *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1245 (6th Cir. 1995). Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment by demonstrating that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed.R.Civ.P. 50). *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). *See also Michigan Protection and Advocacy Service, Inc. v. Babin*, 18 F.3d 337, 341 (6th Cir. 1994) ("The plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a jury could reasonably find for the plaintiff."). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some

type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S. at 324. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment shall be denied "[i]f there are ... 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir. 1992) (citation omitted). Of course, in determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all *reasonable* inferences in the favor of that party. *Anderson*, 477 U.S. at 255 (emphasis added). If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10 A Wright, Miller & Kane, *Federal Practice and Procedure*, § 2726. In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not ... obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990). *See also L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.*, 9 F.3d 561 (7th Cir. 1993); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915 n. 7 (5th Cir.), *cert. denied*, 506 U.S. 832 (1992) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support

a party's opposition to summary judgment. . . ."). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

Normally, an employee is prohibited from prosecuting an action against her employer and must, instead, seek compensation under the Ohio Workers Compensation Act. *See e.g.*, Ohio Constitution, Art. II, § 35, and Ohio Rev. Code § 4123.74. The Ohio Supreme Court, however, has recognized that an employer is liable for intentional torts committed upon its employees in the workplace. *See e.g., Blankenship, supra.* In the absence of direct evidence of intent, a plaintiff may prove such a claim by inferred intent. *Fyffe v. Jeno's Inc.*, 59 Ohio St.3d 115, 570 N.E.2d 1108 (1991).[8] Therein, the Ohio Supreme Court defined, in paragraph 1 of the syllabus, the "intent" necessary to support such a claim:

> 1. Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed. 1984),

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8. Defendants argue that the evidence fails to raise a genuine issue of material fact concerning the question of whether there is direct evidence of their intent to injure Linda Smith. The Plaintiffs have not challenged the Defendants' argument in that regard, with which the Court agrees. Accordingly, the Court concludes that Linda Smith's intentional tort claim must be established inferentially, in accordance with the *Fyffe* test.

> in order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph five of the syllabus, modified as set forth above and explained.)

Although the Defendant has not argued that it is entitled to summary judgment on the first prong of the three-part test set forth in *Fyffe*, it does argue that it is entitled to summary judgment under the second and third prongs. For reasons which follow, the Court concludes that the evidence fails to raise a genuine issue of material fact concerning the second prong of the test; therefore, it sustains the Defendants' Motion for Summary Judgment (Doc. #37),without addressing the third prong of the *Fyffe* test.[9]

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9. The Court previously orally announced to counsel that it would sustain the Defendants' Motion for Summary Judgment (Doc. #37).As a consequence, Plaintiffs have filed a motion, seeking

(Cont'd)

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In paragraph 2 of the syllabus of *Fyffe*, the Ohio Supreme Court elaborated upon that element (i.e., that harm to the employee will be a substantial certainty):

> 2. To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not [sufficient inferred] intent. (*Van Fossen v. Babcock & Wilcox Co.* [1988], 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph six of the syllabus, modified as set forth above and explained.)

(Cont'd)
reconsideration of the Court's decision in that regard. *See* Doc. #75, The Court overrules Plaintiffs' Motion for Reconsideration (Doc. #75), without prejudice to renewal, pursuant to the strictures of Fed. R. Civ. P. 59, if Plaintiffs decide such a motion is appropriate after reviewing this Decision and being advised as to the bases of such.

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59 Ohio St.3d at 115, 570 N.E.2d at 1110.[10]

In order to survive a motion for summary judgment on the second prong of the *Fyffe* test, Ohio courts have generally required evidence of a substantially similar prior accident or a specific affirmative act by the defendant, such as removing a safety guard. *See e.g., Fyffe* (reversing the grant of summary judgment in favor of the employer/defendant, because it had removed a safety guard from the conveyor belt which the plaintiff was cleaning when injured). *Compare Wetmore v. American Guard Co., Inc.*, 2003 WL 1632970 (Ohio App. 2003) (affirming grant of summary judgment in favor of defendant/employer on second prong of *Fyffe* test, because of absence of evidence that it had removed safety equipment from press plaintiff was operating). The defendant's affirmative act must be more than merely passively condoning practices and procedures which, in hindsight, subject employees to a greater risk of harm. That may be negligence or even recklessness, but it does not constitute the inferred intent which is required by *Fyffe*. Herein, there is no evidence that substantially similar accidents occurred or that the Defendants took such affirmative steps.

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10. The Plaintiffs argue that *Fyffe*, wherein the Ohio Supreme Court reversed the entry of summary judgment in favor of the employer, warrants the overruling of the instant such motion. The Court cannot agree. The essential fact supporting the conclusion that there was a genuine issue of material fact on the substantial certainty prong in *Fyffe* was that the employer had removed a safety guard which permitted the plaintiff to be injured. Herein, there is no suggestion that the Defendants removed a safety guard from Operation 40 or did anything remotely similar to the actions of the employer in *Fyffe*.

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In addition, in their memorandum in opposition to Defendants' request for summary judgment, the Plaintiffs explain Linda Smith's intentional tort theory:

> First, the dangerous condition to which Linda Smith [was subjected] must be defined. The evidence supports a factual finding that it was accepted procedure for employees at the Moraine plant to conduct troubleshooting behind the gate guard with power on to the machines and with the spindles rotating, partly because indicator lights on the main control panel that were to aid in troubleshooting were in disrepair. Moreover, the evidence supports a finding that, while in close proximity to the moving parts, employees often had their hair in a ponytail and/or were wearing long sleeved, loose fitting Tyvek coveralls provided to them by the Defendants. Finally, the evidence supports a finding [that], due to poor ambient lighting in the facility, employees would have to use a flashlight and move even closer to the moving parts of the machines behind the gate guards in order to effectively troubleshoot.

Doc. #45 at 16-17. The Defendants argue that the evidence fails to raise a genuine issue of material fact on the issue of whether they knew that harm to Linda Smith was a substantial certainty, even when one considers the dangerous conditions listed by the Plaintiffs both individually and collectively. As a means of analysis, the Court will address the dangerous conditions in the above order.

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With respect to performing troubleshooting behind the safety barrier, the Court concludes that the evidence fails to raise a genuine issue of material fact on the second prong of *Fyffe*. In *Thomas v. Barberton Steel & Iron, Inc.*, 1998 WL 150374 (Ohio App. 1998), the Summit County Court of Appeals concluded that the evidence failed to raise a genuine issue of material fact on the second prong of *Fyffe*. Therein, the plaintiff was a machine operator and was required to clean his machine as part of his duties. Although instructed to de-energize the machine before cleaning it, the plaintiff often times skipped that step in order to save time, since the machine frequently had to be turned on during the cleaning process to clear debris. While plaintiff was cleaning the machine without having de-energized it, the machine recycled and amputated his arm. Plaintiff supported his intentional tort claim by arguing that he had cleaned the machine without de-energizing it numerous times and that, although management was aware of that fact, it had done nothing to prevent him from doing so. In response to that argument, the court of appeals wrote:

> Thomas's second allegation was that he had cleaned the core making machine in this same manner in the past and had been observed doing so by his superiors, but they had done nothing to correct him. Although such action on the part of his employer may have amounted to negligence, it did not rise to the level of substantial certainty of injury. The evidence was undisputed that this "unsafe" procedure had never resulted in an injury or a single incident in which a core making machine accidentally started during a maintenance

> procedure. Thomas himself had performed this procedure, apparently in the same manner, hundreds of times without incident. The absence of prior accidents strongly suggests that injury from this procedure was not substantially certain to occur.

Id. at *3. Similarly, herein, there is no evidence of any employee being injured as a result of having his or her clothing caught in a drill because he or she was trouble-shooting inside the safety barrier. The Plaintiffs argue that Randy Pettit was injured under similar circumstances. The Court cannot agree. Pettit testified during his deposition that he deliberately reached into a machine to move a cooling line which resulted in his sleeve being caught in a drill. In addition, Plaintiffs cite the deposition testimony of David Watkins to the effect that he had seen employees clothing ripped as a result of getting it caught in a machine. That deposition testimony is not sufficient to raise a genuine issue of material fact, since there is no evidence about the surrounding circumstances of those incidents. Accordingly, the evidence fails to raise a genuine issue of material fact on the question of whether the Defendant knew to a substantial certainty that Linda Smith would be injured if she engaged in troubleshooting inside the safety barrier, with the machines under power.[11]

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11. To the extent that the Plaintiffs argue that the Defendants committed an intentional tort by failing to install some sort of device, like an interlock system, which would have prevented Linda Smith from suffering her injuries, the above reasoning is equally applicable to such a claim.

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With respect to the lights on the control panel being in a state of disrepair, the evidence establishes that the lights on the control panel would assist only in revealing problems at a drill station; thus, they would not assist in revealing the cause of the jam-up which Linda Smith and Chambers were investigating when her injuries occurred. Therefore, there cannot be a causal connection between the burned out lights and Linda Smith's injuries.

With respect to Linda Smith's ponytail, the evidence is that she wore her hair in a ponytail every day at work. In the absence of evidence that anyone, including Linda Smith, had ever suffered an injury as a result of wearing her long hair in a ponytail, the Court cannot conclude that the evidence raises a genuine issue of material fact on the question of whether the Defendants knew, to a substantial certainty, that Linda Smith would be injured if she were permitted to wear her hair in a ponytail.

With respect to Tyvek coveralls, it bears emphasis that, although Defendants made these articles of clothing available, employees were not required to wear them. On the contrary, it was a matter of choice. In addition, the Plaintiffs' theory is based upon the fact that the coveralls she wore had long, loose sleeves. It bears emphasis that three sizes, small, medium and large, were available, and Linda Smith unilaterally decided to wear the large size. In addition, there is no evidence that Linda Smith, or any other employee, ever experienced a problem with her Tyvek coveralls being caught in a machine in a similar manner before February 9, 2009. Accordingly, the evidence fails to raise a genuine issue of material fact on the question of whether the Defendant knew to a substantial certainty that Linda Smith would be injured by wearing Tyvek coveralls.

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With respect to the alleged lack of ambient lighting in the machining department at the Moraine plant, the Plaintiffs theory is that the lack of light made Linda Smith use a flashlight to examine station 14 and to get closer to the moving spindle drills. Simply stated, for the reasons set forth above in connection with troubleshooting behind the safety barrier, the Court concludes that this evidence fails to raise a genuine issue of material fact as to whether Defendants knew to a substantial certainty that Linda Smith would be injured as a result of the lack of ambient lighting. Moreover, it bears emphasis that there is no evidence that any other employee of Defendants has suffered an injury under comparable circumstances as a result of the lack of such lighting.

In addition to the foregoing matters, the Plaintiffs' safety expert, whose affidavit is discussed below, mentioned therein the lack of training provided to job setters to troubleshoot safely a jam-up on a multi-spindle drilling machine. Assuming for sake of argument that the Plaintiff is relying upon this lack of training as a dangerous condition to which she was subjected in the workplace, the evidence fails to raise a genuine issue of material fact on the question of whether the Defendants knew to a substantial certainty that Linda Smith would be injured as a result of this lack training. For instance, there is no evidence that any other job setter was injured as a result of the lack of training. In addition, while Ohio courts have characterized the failure to provide training as negligent or even reckless, they have not concluded that it rises to the level of a substantial certainty. *Kozoil v. Quality Stamping Products*, 1992 WL 41849 (Ohio App. 1992).

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Finally, it should be noted that the Plaintiffs have opposed the Defendants' request for summary judgment with, *inter alia*, the affidavit from their safety expert, Gerald Rennell ("Rennell"). Therein, Rennell states:

> 20. The affiant further states that it is my opinion, based upon my experience and expertise and to a reasonable degree of safety engineering certainty, that the practice of employees entering behind gate guards to conduct troubleshooting with power on to the machines and with spindles rotating created a condition in which General Motors[']s supervision had knowledge that injury was substantially certain to occur.
>
> 21. The affiant further states that, in addition to the facts set out in paragraph 13 above, General Motors[']s supervisor's knowledge of each of the following facts contribute to Defendants' knowledge that injury was substantially certain to occur:
>
> > A. That job setters and other employees were entering the danger area inside the guard with the spindles rotating with long hair in a ponytail and/or Tyvek outer garments with long, loose sleeves that had been provided by General Motors.
> >
> > B. That General Motors had at least one prior similar incident causing injury

> where a job setter's clothing caught on a rotating spindle when he entered the danger area with the spindles rotating.
>
> C. That General Motors supervision had not provided Linda Smith training to safely perform when troubleshooting a jam-up on multi- spindle drilling machines.
>
> D. That lights on the main control panel for the operation in question that were intended for use in troubleshooting were not functioning properly, yet were left in disrepair.
>
> E. That the ambient lighting around the machinery was inadequate such that employees would have to move in close proximity to the rotating parts of machines with a flashlight in order to see to effectively troubleshoot.

Doc. #50 at Ex. O at 3-4. In paragraph 13, Rennell states that, before February 9, 2000, General Motors knew that job setters, with their long hair in ponytails and wearing Tyvek coveralls with long, loose sleeves, were entering the danger area while the spindle drills continued to rotate. *Id.* at 3. Simply stated, the conclusory statements in Rennell's affidavit do not raise a genuine issue of material fact, since they fail to comply with Rule 56(e), which in relevant part provides:

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> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

In *Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 598-99 (6th Cir. 1999), the Sixth Circuit applied that part of Rule 56(e) in an action in which the plaintiff, a registered nurse, alleged that the defendant had violated the ADA by failing to accommodate her disability by permitting her to work eight rather than twelve-hour shifts. The District Court granted summary judgment to the defendant, and the plaintiff appealed. The issue facing the Sixth Circuit was whether the evidence raised a genuine issue of material fact on the question of whether the plaintiff was disabled under the ADA. In particular, the Plaintiff argued that such a genuine issue of material fact was raised by the statements in the affidavit of her vocational expert, who had opined that the plaintiff's impairments prevented her from engaging in most jobs in the national and regional economies as a registered nurse. The Sixth Circuit rejected the argument, writing that the statements in vocational expert's affidavit were "merely conclusory, restating the requirements of the law, and therefore cannot create a genuine issue of material fact sufficient to defeat a motion for summary judgment." *Id.* at 599. Similarly, the conclusory statements in Rennell's affidavit herein, which merely restate the second prong of the *Fyffe* test following which the alleged dangerous

conditions are listed, cannot create a genuine issue of material fact.[12] Missing from Rennell's affidavit are the building blocks upon which his conclusions are based. Rather than setting forth that foundation and then explaining how and why it leads to his conclusion (which coincides nicely with the Plaintiffs' theory of the case and the elements of an intentional tort claim), he merely lists the conditions at Operation 40 and the conclusion that Defendants had knowledge that an injury was substantially certain to occur.

In sum, the evidence fails to raise a genuine issue of material fact on the second prong of the *Fyffe* test, i.e., that Defendants knew that injury to Linda Smith was a substantial certainty. Therefore, the Defendants are entitled to summary judgment on Linda Smith's intentional tort claim. Since the Defendants are entitled to summary judgment on Linda Smith's claim, they are also entitled to summary judgment on Gregory Smith's derivative claim for loss of consortium. Accordingly, the Court sustains Defendants' Motion for Summary Judgment (Doc. #37). Judgment is to be entered in favor of Defendants and against Plaintiffs.[13]

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12. It bears emphasis that the remainder of Rennell's affidavit does not explain the conclusory statements in ¶¶ 20-21.

13. As a result of the Court's ruling on Defendants' Motion for Summary Judgment, the Court overrules, as moot, their Motion in Limine (Docs. ##55, 56 and 57). In addition, the Court overrules, as moot, the Joint Motion to Continue (Doc. #60), with which the parties requested that the Court extend the time on which they were required to file the jointly-prepared Final Pretrial Order.

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The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

March 22, 2004

/s/ Walter Herbert Rice
WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT